No. 96-110

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF WASHINGTON and CHRISTINE O. GREGOIRE,
Attorney General of the State of Washington,
Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D.,
THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D. PH.D.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS DEALT WITH HEREIN

The issue in this case is whether there is a constitutional right to commit suicide and, if so, whether it includes a right to assistance.

The sub-issues dealt with herein are:

1. What principles established by this Court govern the formulation of proposed fundamental rights to be measured for fundamentality against the history and tradition of our Nation?

2. Under these principles, what is the proper formulation of the proposed fundamental right in this case?

3. Measuring the properly-formulated, proposed fundamental right against the history and tradition of our Nation, does a fundamental right exist which governs the decision in this case?

4. Does this Court's abortion or refusal of treatment jurisprudence require it to proclaim a constitutional right to assisted suicide?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The National Right to Life Committee, Inc. ("NRLC) is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of persons until the time of natural death. NRLC is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life. The members of NRLC have been strong proponents of laws protecting innocent human life from the time of conception until the time of natural death. The members of NRLC have actively opposed the various recent initiatives to overturn statutes barring assisted suicide. NRLC seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF THE ARGUMENT

Prior to measuring a proposed fundamental right against the history and tradition of our Nation — to determine whether it has been considered a fundamental liberty — the proposed right must be properly formulated. Failure to properly formulate the proposed right risks constitutionally illegitimate decisions. To avoid this problem, this Court has employed certain principles in formulating proposed fundamental rights. These are formulated herein into a derived rule.

As a general rule, the precedents of this Court require that a proposed right be expressed in a concrete, fact-sensitive manner. This general rule is comprised of a three-prong consideration. First, the formulation of a proposed fundamental right should focus on the activity proposed to be protected by taking into account all relevant facts. Second, the formulation of a proposed fundamental right should not be overbroad so as to encompass other activities which are logically distinct and involve separate considerations.

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[1]Consents from the parties to filing this brief have been filed with the Clerk. Amicus curiae expresses its appreciation to Kristian M. Dahl, Esq. for assistance in writing this brief.

Third, the formulation of a proposed fundamental right should reasonably accommodate all the interests at stake in the case.

Under these principles, established by the precedents of this Court, the formulation of the proposed fundamental right in this case must be whether there is a fundamental right to commit suicide and, if so, whether the right includes assistance in committing suicide. Other formulations proposed by plaintiffs/respondents are so overbroad as to encompass numerous other activities never recognized as lawful or constitutionally protected.

Applying the proper test to a properly framed issue reveals that there is no recognized constitutional liberty interest in committing assisted suicide. However, even if there were, there are compelling interests which override the interest, preventing the recognition of a fundamental right to have assistance in committing suicide.

I. AN ISSUE TESTED AS A FUNDAMENTAL RIGHT MUST BE FRAMED IN A CONCRETE, FACT-SENSITIVE MANNER BEFORE BEING MEASURED OBJECTIVELY AGAINST THE HISTORY AND TRADITION OF OUR NATION.

The first step in determining whether there is a constitutional right to assisted suicide is to frame the proposed right in a concrete, fact-sensitive manner. The proper question herein is a straightforward one: "Is there a constitutional right for terminally-ill, competent adults to commit suicide and, if so, whether it includes a right to assistance?" *See People v. Kevorkian*, 447 Mich. 436, 476 n.47, 527 N.W.2d 714, 730 n.47 (1994), *cert. denied sub nom. Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995). This topic is treated in subsection I.A., *infra*.

Once a concrete formulation of a right proposed for constitutional protection is framed, a neutral, constitutionally legitimate analysis for evaluating proposed fundamental rights must be used. The best-reasoned constitutional opinions of this Court have relied on the historical, objective test for fundamentality, i.e., whether the proposed right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This subject is discussed in subsection I.B., *infra*.

A. *In Framing an Issue to be Tested as a Fundamental Right, the Issue Must Be Framed in a Concrete and Fact-Sensitive Manner, i.e., "Is There a Fundamental Right to Commit Suicide and, if so, Does It Include a Right to Assistance?"*

In proposing an asserted fundamental right, the issue tested must be framed in a concrete, fact-sensitive manner. Otherwise, the framing of the issue can determine an outcome not reachable by an objective, legitimate analysis. As this Court has stated recently:

> "Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins [v. City of Harker Heights]*, 503 U.S. [115], [125 (1992)] . . . ; *see Bowers v. Hardwick*, . . . 478 U.S. [186,] 195-95 (1986)] . . . .

Reno v. Flores, 113 S. Ct. 1439, 1447 (1993).

The Ninth Circuit did not frame the issue in this case as whether there is a right to commit suicide and, if so, whether the right includes a right to assistance, which would be the proper formulation. Rather, the Ninth Circuit chose this formulation: "Today we are required to decide whether a person who is terminally ill has a constitutionally-protected liberty interest in hastening what might otherwise be a protracted,[2] undignified, and

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[2]Although this case purportedly involves an as-applied challenge, the terminally-ill plaintiffs/respondents all died while the case was in the district court or on appeal. Thus, this case is more correctly viewed as a facial challenge which must fail because there are applications of Washington's assisted suicide prohibition which are unquestionably constitutional. *United States v. Salerno*, 481 U.S. 739 (1987). Respon-

(continued...)

extremely painful death," *Compassion in Dying v. State of Washington*, 79 F.3d 790, 793 (9th Cir., 1996), including "the prescribing of medication by a physician for the purpose of enabling a patient to end his life." *Id.* at 802. The Ninth Circuit combined a multi-conditioned "right to die" with specific conduct, resulting in the de facto creation of a right to assisted suicide. Rather than simply and correctly framing the asserted right as a right to assisted suicide, the Ninth Circuit chose broader, more amorphous language about hastening death to permit it to reach its chosen outcome.

In an attempt to justify its finding of a right to assisted suicide, the Ninth Circuit further broadened its formulation of the asserted fundamental right, citing the *Casey* decision's supposed privacy right in matters "involving the most intimate and personal choices." *Id.* at 801 (*citing Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)). The proper question is not whether individuals have "the right to define one's own concept of existence," or the right to make "intimate and personal choices . . . central to personal dignity and autonomy," as the joint opinion in *Casey* and the Ninth Circuit have characterized the privacy right. *Casey*, 505 U.S. at 851. Neither is the issue whether there is a "right to die. *Compassion in Dying*, 79 F.3d at 801."[3]

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[2](...continued)
dents, with assistance from the Ninth Circuit, are attempting to establish a broadly available regime of assisted suicide and active euthanasia (even for incompetent persons via substituted judgment) by (1) bypassing the *Salerno* rule by attempting to position this case as an as-applied challenge and then (2) (if a right is declared for the "as applied" group) using that right as an equal-protection lever to expand the right to both a broader group and to an active euthanasia right. The principles of *Salerno* should govern this transparent effort, which should be rejected. In any event, the fact-based formulation used by the Ninth Circuit in the passage quoted is inappropriate given the absence of terminally ill persons as parties in this case.

[3]While the Ninth Circuit *en banc* panel often labels the right tested (continued...)

These broad, grand-sounding, generalized efforts to describe this Court's privacy jurisprudence could be interpreted to constitutionalize all sorts of behavior, legal and illegal. It is noteworthy that these sweeping efforts to summarize the right to privacy in *Casey* were given in that case only after a concrete list of actual, concrete applications of the privacy doctrine. The list included, the right to make "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851. The Court went on to give even more specific examples of rights recognized in these areas. *Id.* It is these concrete examples which demonstrate the true content of the privacy right recognized by this Court, not the abstract formulations which could sweep in both constitutionally protected and unprotected activities, and which leave a court free to add new constitutionally protected activities at will.

Deciding how to properly frame a proposed constitutional right to be tested to see if it rises to the level of a fundamental right has been a long-standing problem. A right not properly framed may sweep too broadly. For example, an attempt to combine the right to contraception and the right to abortion into a right to control the makeup of one's family might seem at face value to make sense. However, such an overarching right would logically encompass, inter alia, the right to commit infanticide, a time-honored method of controlling family size in many cultures, but one traditionally rejected in our own. Similarly, a right to control the makeup of one's family would logically encompass the right to engage in

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[3](...continued)
as the "right to die," *Compassion in Dying*, 79 F.3d at 801, 802, 803, it attaches so many conditions on this term as to make it an unworkable statement of the right being tested. Among the conditions are the presence of adequate safeguards, *id.* at 821, a limitation to "patients," *id.* at 797, 820, or to "terminally ill," *id.*, "conscious adults," *id.* at 817, who must be "competent adults," *id.*, and not suffering from "treatable mental disorders," *id.* at 820. At one point the panel speaks of those with "unmanageable pain and suffering," *id.* at 824, although it never limits the right it proclaims in this supposed facial challenge to such persons.

polygamy. Of course, neither infanticide nor polygamy have been recognized as fundamental rights. What is clear from this illustration is that this Court has found contraception and abortion to be fundamental rights, but there is no right to control the makeup of one's family. The right is framed too broadly.

Neither has there ever been recognized a right to "define one's own concept of existence." Such efforts to create overarching rights are an attempt to synthesize the privacy decisions of this Court. However, using them as the measuring rod for testing newly proposed rights for fundamentality is plain error.

Because of the problems posed by an overbroad formulation of a proposed right, this Court has established certain principles, which may be derived from its opinions, for formulating proposed rights to be tested for fundamentality. The Michigan Supreme Court gave thoughtful consideration to the framing of the proposed right in *People v. Kevorkian*, 447 Mich. 436, 476 n.47, 527 N.W.2d 714, 730 n.47 (1994), *cert. denied sub nom. Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995), a case rejecting a federal constitutional right to assisted suicide:

> [I]t is important to the analysis of substantive due process that the asserted right be framed in a precise and neutral manner. This is critical in cases involving end-of-life questions, which are particularly susceptible to emotion-laden terminology and flawed syllogisms. The approach of the United States Supreme Court in assessing whether a proposed right is "fundamental" has been to narrow the threshold inquiry by applying three principles: (1) the focus should be on the specific activity that proponents argue is protected by the constitution, taking into account all relevant facts, (2) the formulation should not be so broad as to encompass activities that are logically distinct and involve separate considerations, and (3) the formulation should reasonably accommodate all of the interests at stake. Bopp & Coleson, *Webster and the Future of Substantive Due Process*, 28 Duq. L. R. 271, 281-291 (1990). *See Webster v. Reproductive Health Services*, 492 U.S. 490 . . . (1989). The question presented in this case thus is not whether a person has a

> constitutional right of self-determination, or a right to define personal existence, or a right to make intimate and personal choices, or a right not to suffer. Rather, the question that we must decide is whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance.

As stated by the Michigan Supreme Court, this Court's approach has been to frame rights framed in a concrete, fact-sensitive manner. This requires application of three principles. Bopp & Coleson, *Webster and the Future of Substantive Due Process*, 28 Duquesne L. R. at 284-87 (hereinafter "*Substantive Due Process*").

"First, the formulation of a proposed fundamental right should focus on the activity proposed to be protected by taking into account all the relevant facts." *Id.* at 284. This requires focus on the actual activity proposed for constitutional protection, not broad, abstract descriptions of historically-recognized rights. As noted above, the broad language of *Casey*, which the Ninth Circuit followed, could allow vast numbers of asserted rights to be swept within the constitutional fortress. The actual level of specificity must take into account all relevant facts relating to the activity proposed for constitutional protection. Focusing on the actual, concrete activity proposed and all relevant facts relating to it will enable the framing of an issue which is neither too broad nor too narrow. *Id.* at 284-85.

Numerous examples abound in Supreme Court jurisprudence. Consider the example of marriage. This Court has recognized a constitutional right for a man and woman to marry. *Loving v. Virginia*, 388 U.S. 1 (1967). The issue was framed in a concrete manner focusing on the actual activity proposed for protection, i.e., marriage, as opposed to some broad, amorphous right, e.g., the right to control the makeup of one's family. However, because marriage is a covenant between a man and a woman to join together in a societally-sanctioned relationship, the fact that the individuals are of a different race is irrelevant to the formulation of the right proposed. *Id.* (miscegenation law struck down on equal

protection and substantive due process grounds). As a result, the proper balance is struck between concrete focus on the activity and omitting irrelevant facts by framing the issue in *Loving* as whether there is a constitutionally protected right for a man and a woman to marry. Similarly, the fact that one party to a proposed marriage is a prisoner is irrelevant to the formulation of the right to marry, *Turner v. Safley*, 482 U.S. 78 (1987), but marriage to a person of the same sex is a highly relevant fact, for it would radically alter the definition of marriage. *See Baker v. Nelson*, 291 Minn. 310, 315, 191 N.W.2d 185, 187 (1971) ("[I]n common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."), *appeal dismissed*, 409 U.S. 810 (1972).

"Second, the formulation of a proposed fundamental right should not be overbroad so as to encompass other activities which are logically distinct and involve separate considerations." *Substantive Due Process* at 286. In considering the constitutionality of a law barring polygamous relationships, it would be overbroad to frame the issue in terms of a right to marriage, which is constitutionally protected. Given the context of the case in which a right to marriage was pronounced, it is evident that the right is to a monogamous relationship. *Loving v. Virginia*, 388 U.S. 1 (1967). While polygamy may be ranked as fundamental in the history and tradition of some cultures throughout history, it has not been so ranked in our Republic. *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding anti-polygamy laws against constitutional attack).

"Third, the formulation of a proposed fundamental right should reasonably accommodate all the interests at stake in a case." *Substantive Due Process* at 286. While this prong may seem somewhat overlapping with the prior parts of the test, it is designed to guarantee that in eliminating allegedly irrelevant facts from the formulation no interests of others are pruned away. For example, in formulating a proposed right to discharge a firearm, it is logically relevant whether the firearm is being discharged into another person.

Certain decisions of this Court illustrate these principles well. In the case of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), this Court considered the case of a man who allegedly fathered a child by an adulterous relationship with the wife of another man. The plurality formulated the proposed right as "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man." *Id.* at 125. This formulation demonstrates the above tri-part rule. First, the formulation is concrete and fact-sensitive, including all relevant facts. Second, the formulation is not overbroad, so as to encompass other activities which are logically distinct and involve other considerations. Third, the formulation does not exclude the interests of all involved in the situation. The Court correctly did not merely ask whether natural fathers have constitutional rights involving their children.

Similarly, the case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), demonstrates the proper framing of a proposed constitutional right. *Bowers* involved an appeal from the criminal prosecution of two male homosexuals arrested by a police officer *in flagrante delicto* for violation of a state sodomy law. The Court framed the issue in a concrete fact-specific manner, including only relevant facts, and accounting for all interests, deciding whether there was a right to engage in "consensual homosexual sodomy." *Id.* at 188 n.2. This formulation dealt with the statute as it was applied in the action before the Court, excluding the irrelevant detail of whether the activity involved oral or anal genital contact. The Court's formulation also excluded nonconsensual and heterosexual sodomy, which were beyond the facts of this case, and any discussion of third parties, which were not involved in any way. Framing the issue so as to encompass heterosexual sodomy would have also involved logically distinct considerations, such as whether, if a couple were married, the principles undergirding *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down any restriction on contraceptives for married couples), would preclude regulation of heterosexual sodomy.

By contrast, the *Bowers* dissent chose broad, abstract formulations of the proposed constitutional right which would encompass

homosexual activity. For example, Justice Blackmun spoke of "the right to be let alone," *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quotation marks and citation omitted), the right to make "certain *decisions*" and do activities in "certain *places*," *id.* at 204 (emphasis in original), to do things which "form so central a part of an individual's life," *id.*, "the ability independently to define one's own identity," *id.* at 205 (quotation marks and citations omitted), "the freedom an individual has to choose the form and nature of these intensely personal bonds," *id.* (emphasis in original), "the fundamental interest all individuals have in controlling the nature of their intimate associations with others," *id.* at 206, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home," *id.* at 208, and "the right to differ as to things that touch the heat of the existing order." *Id.* at 211. In addition, three dissenters joined in formulating the proposed right as "the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny." *Id.* at 217 (Stevens, J., dissenting).

By framing the issue herein as "the right to die," the Ninth Circuit creates a right so broad that it would encompass everything from refusal of treatment to euthanasia, with assistance by health care workers, families, and even friends, not just physicians. *Compassion in Dying*, 79 F.3d at 819, 825-28, 857. The purported liberty interest is stated in terms of avoiding pain, yet this purportedly as-applied challenge is not brought (nor is relief granted) only for those in intractable pain, and the en banc panel also suggests a desire to avoid medical bills may allow the interest in question to prevail. *Id.* at 826. Additionally, the "right to die" of the Ninth Circuit would not be limited to mentally competent people, as duly appointed surrogates would be recognized equally to the patient himself. *Id.* Finally, the Ninth Circuit states that future "right to die" cases could expand to encompass other forms of life-ending medical assistance, such as the administration of drugs by a physician, i.e., active euthanasia. *Id.* at 831. The Ninth Circuit acknowledges that there is no clear demarcation between physician-assisted suicide and the administration of deadly drugs. *Id.*

The Ninth Circuit decided to label the tested right the "right to die." This was done to lump assisted suicide, widely prohibited and not historically recognized as a right, with more popular and well-recognized conduct involving end-of-life decisions, such as disconnecting a brain-dead, comatose patient from a respirator, or the right to refuse medical treatment recognized in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Similarly, framing the asserted right to assisted suicide as a right to "hasten" one's death or to choose the timing and manner of one's death is an effort to find support for assisted suicide by lumping it with treatment refusal and withdrawal law.[4]

As may be seen from these examples, the only appropriate formulation of the proposed constitutional right herein is whether there is a fundamental right to assisted suicide. Any more generalized expression, such as the broad language cited from the *Casey* joint opinion or the "right to die" also favored by Respondents and the Ninth Circuit, is an effort to resolve the issue by framing the question in a manner permitting the chosen outcome, rather than by a neutral constitutional analysis.

B. *The Test for Constitutionality of a Statute Must Be Objective and Historically-Anchored.*

A necessary corollary to a neutral formulation of a right proposed for constitutional protection is a neutral method of testing whether the proposed right is a fundamental one. Without a

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[4]The Ninth Circuit appears to make an effort to frame the issue of this case in a fact-sensitive manner by stating it as follows: "Whether a person who is terminally ill has a constitutionally-protected [Fourteenth Amendment due process] liberty interest in determining the time and manner of one's own death." *Compassion in Dying* at 793. At numerous other parts in the Ninth Circuit decision, the question changes to "the right to die," *Compassion in Dying* at 802, "hastening one's death for an important reason," *id.* It is noteworthy that the requirement that a physician assist the suicide is not even essential to the analysis. Writing for the majority, Judge Reinhardt states that "[I]t is the end and not the means that defines the liberty interest." *Id.* at 801.

neutral, constitutionally legitimate analysis for evaluating proposed fundamental rights, the integrity of the judiciary is undercut and decisions are without authority. If "the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of th[e Supreme] Court," *Moore v. East Cleveland*, 431 U.S. 494 (1977), then the very rule of law has been supplanted by the rule of men.

The decision of the People of the United States in establishing their governmental Constitution was to adopt a rule of law, not a rule by men by Platonic guardians in the judiciary or any other branch of the government. As a result, a court must demonstrate by carefully reasoned analysis that its opinion is firmly anchored in the Constitution to be legitimate. Justice White expressed the danger of unfettered discretion by the judiciary:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause . . . .

Id. at 544 (White, J., dissenting) (quoted in *Michael H.*, 491 U.S. at 122 (plurality opinion); *cf. Bowers*, 478 U.S. at 194.

Because of the danger of illegitimacy, the best-reasoned Constitutional opinions of the Supreme Court have relied on an historical, objective test for fundamentality, i.e., whether the proposed right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This historical formulation of the test for fundamentality was central to the constitutional analysis in the *Bowers* case. 478 U.S. at 193-94 (plurality opinion). The *Bowers* opinion also made reference to another test, from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), i.e., whether the proposed fundamental right is "'implicit in the concept of ordered liberty'

s[o] that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Bowers*, 478 U.S. at 191-92 (quoting *Palko*, 302 U.S. at 325-26). Similarly, in *Michael H.*, Justice Scalia noted the dangers of illegitimate decisions, *Michael H.*, 491 U.S. at 122, and the importance of establishing legitimacy with an historical, objective test for fundamentality. In sum, the two complimentary tests for fundamentality are whether the proposed right is (1) implicit in the concept of ordered liberty and/or (2) so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Plaintiffs/Respondents will dispute whether these tests govern, arguing that the Supreme Court has rejected such tests by rejecting completely any use of a formulary approach to determining what rights are protected under the Due Process Clause's liberty guarantee. *Casey*, 505 U.S. at 849-850. Although space does not allow an exhaustive analysis of the Supreme Court's recent debates with regard to testing proposed constitutional rights for fundamentality, a brief discussion will put the reference about no "formula" from *Casey* in context and show that it does not mean that this Court has thrown traditional substantive due process analysis out the window.

From the earliest ventures of this Court into substantive due process, the Court has had to deal with what tests would govern whether a proposed right would be found to be a fundamental constitutional right. The Court has consistently held that the mere whim of five Justices would not be enough to establish a constitutional right. Some effort had to be made to keep judges from "roaming at large in the constitutional field." *Griswold v. Connecticut*, 381 U.S. 479, 502 (Harlan, J., concurring).

The tests were established early in the development of substantive due process analysis. They were, as noted above: (1) whether the proposed right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105, or (2) whether proposed fundamental rights are "implicit in the concept of ordered liberty so that neither liberty

nor justice would exist if [they] were sacrificed." *Palko*, 302 U.S. at 325-26.

There have been two efforts to refine the test for fundamental rights. One would have required that no fundamental rights could be found in the Due Process Clause unless they were enumerated in the Constitution. This incorporation doctrine was what Justice Harlan objected to in *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) and in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting), when he said that "process has not been reduced to any formula." *Id.* at 542. The Supreme Court has rejected the incorporation doctrine by expanding the list of fundamental rights to include rights not expressly listed in the Constitution.

A second effort to refine the test for fundamental rights was made by Justice Scalia, with support from Chief Justice Rehnquist, who argued that in formulating a proposed right to be tested for fundamentality the Court must use the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (opinion of Scalia, J.). While Justices O'Connor and Kennedy joined the rest of Scalia's opinion, they refused to join this footnote six formulation regarding the specific level of generality for formulating a proposed fundamental right, declining to foreclose the unanticipated by the prior imposition of a single mode of historical analysis. *Id.* at 132.[5]

These, then, are the debates which spill into the *Casey* opinion, *Casey*, 505 U.S. at 849-850, and upon which Respondents rely for the notion that the Court rejects any type of formulary approach to determining what rights are protected under the Due Process

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[5]The discussion, *supra*, about the proper framing of an asserted right takes the debate over this footnote into account and applies even if the right is not framed at the most specific level for which there is an historical tradition. However, as noted in the text, concern over cases such as *Loving v. Virginia* may be simply resolved by properly framing the issue. *See supra* at 7.

Clause's "liberty" guarantee, such as whether the right was "deeply rooted in this Nation's history and tradition," or whether "liberty or justice would cease to exist if [it] were sacrificed." These tests have not changed and ought not to be changed.

Clearly Respondents misunderstand the debate on the Supreme Court. A careful reading of *Casey* will reveal that the majority of this Court rejects formulation of proposed rights at only the most specific level and rejects the notion that only those rights "that were protected against governmental interference by other rules of law when the Fourteenth Amendment was ratified" may be found to have substantive due process protection. *Casey*, 505 U.S. at 847-48. The Court reiterates the latter point: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id.* at 848. The *Casey* majority then proceeded to quote Justice Harlan's dissent in *Poe v. Ullman* for the proposition that "[d]ue process has not been reduced to any formula." *Id.* at 848-49; *Poe*, 367 U.S. at 542. Justice Harlan's analysis was adopted in *Griswold*, 381 U.S. 487.

What Respondents fail to notice is that in Justice Harlan's dissent in *Poe*, he endorsed the notion that the Court should look to history in determining whether proposed rights should be deemed fundamental, i.e., look to "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Poe*, 367 U.S. at 542. With regard to assisted suicide, the tradition of our people has been to prohibit it and there is no significant of departure from that tradition. Likewise, in *Griswold* Justice Harlan, while still rejecting the formula of the incorporation doctrine, *Griswold*, 381 U.S. at 500-01, at the same time endorsed the *Palko* test: "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (citation omitted).

In other words, the Justice whom Plaintiffs/Respondents cite for a rejection of any "formulary" approach specifically embraced the tradition-of-our-people and implicit-in-ordered-liberty tests which Respondents would reject as being too formalistic. Nor is there any evidence that any of the Judges on the Supreme Court, in *Casey* or elsewhere, have abandoned these two historical tests. The debate lies elsewhere. These tests are well-established and must be applied in this case.

C. *The Analysis of* Planned Parenthood of S.E. Pennsylvania v. Casey *Is Inapplicable to Assisted Suicide.*

Respondents attempt to establish a constitutional right to assisted suicide by analogy to the right to abortion, relying on certain broadly-worded language of the *Casey* decision, 505 U.S. 833, and the right to refuse medical treatment, as expressed in *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990). The tenuous analogies to *Casey* and *Cruzan* were adopted by the Ninth Circuit as well. *Compassion In Dying*, 79 F.3d at 813-16. As shown below, the "analogy" approach is an inappropriate methodology, even if the analogies proposed were sufficiently parallel, which they are not. Moreover, *Casey* is inapposite as shown below, and *Cruzan*, while somewhat more conceptually related, actually leads to a different conclusion than the en banc Ninth Circuit panel reached.

Respondents attempt their analogy by using selective, general language from the *Casey* opinion involving "intimate and personal choices . . . central to personal dignity and autonomy" and "the right to define one's own concept of existence." *Compassion In Dying* at 813 (quoting *Casey*, 505 U.S. at 853). Such a broad, general framing of constitutional rights is inappropriate, as discussed in detail *supra*, because it gives courts absolute discretion to place new rights within the pale of constitutional protection. For the present, however, it is important to note how inapposite the abortion right is to a right to assisted suicide. Two key differences demonstrate the error of relying on Casey for a right to assisted suicide. *See also*, Spindelman, *Are the Similarities Between a Woman's Right to Choose and Abortion and the Alleged Right to*

Assisted Suicide Really Compelling?, 20 U. Mich. J. of L. Reform 775 (1996); and Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide — And Why These Reasons Are Not Convincing*, 12 Issues in L. & Med. 113 (1996).

1. *Casey*, an Abortion Case, Dealt with "Potential Life," Not Born Persons.

From the time of *Roe v. Wade*, 410 U.S. 113 (1973), a woman's interest in obtaining abortion has been balanced against what the Court described as the "potentiality of human life." *Id.* at 162. Casey likewise describes the life interest at stake in the abortion decision as "potential life." *Casey*, 505 U.S. at 871. With regard to life that is only asserted to be "potential," *Roe* acknowledged no compelling state interest until viability. At viability, however, a state's interest in protecting this "potential" life became a "compelling" interest, overriding a woman's right to choose abortion. *Roe*, 410 U.S. at 163.

In the context of dealing only with "potential" life, the *Casey* joint opinion asserted that the proper mode of balancing was the undue burden standard. *Casey*, 505 U.S. at 876. Of course, after viability the state's interest in protecting unborn life becomes compelling and abortion may be proscribed, *id.* at 869, even though unborn life remains "potential." *Id.* at 871, 876.

If a state's interest in protecting "potential" life may become compelling at some point, how much greater must be the state interest in protecting the human life of born persons. The interest in protecting this "actual" life would also be compelling and would be sufficiently powerful to allow the state to criminalize either the destruction of that life or assisting in the destruction of that life, just as it may bar the destruction of viable "potential" life.

The state's compelling interest in protecting life includes protecting not only the individual from an act of assisted suicide but society at large. This includes adults subject to undue influence, young people subject to suicide ideation and influenced by societal acceptance of suicide, and society at large subject to a debasing of the value of life and wishing to resist it. Respondents

cannot explain away this critical distinction between the abortion cases and assisted suicide. As a result, the abortion cases do not provide authority for a right to assisted suicide.

2. *Casey* Relied Heavily on Stare Decisis, Which Stands Against an Assisted Suicide Right.

The *Casey* case also provides a poor foundation on which to build other rights because of its heavy reliance on stare decisis to shore up a foundation badly eroded by constitutional scholarship and experience living with the *Roe* formula. The very joint opinion in which Respondents place such trust contains the following comment:

> On the other side of the equation is the interest of the State in the protection of potential life. . . . The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are not satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.

Casey, 505 U.S. at 871 (joint opinion, not for the Court).

The Justices in the joint opinion made it very clear that their reaffirmance of *Roe* was based on their desire to abide by precedent, not on the soundness of *Roe*'s holding. Thus, the abortion precedent is not a sound foundation on which to build a whole new right which has no connection to abortion.[6]

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[6]The erroneous attempt to connect the two by use of abstract language from the joint opinion is discussed *supra*.

In fact, the strong *Casey* reliance on stare decisis has an opposite effect. If *Casey* stands for stability in the law and respect for precedents, it stands against the overreaching and judicial activism Respondents propose in order to create a constitutional right to assisted suicide where state laws have clearly and near-universally condemned the practice.

D. *The Cruzan Case Gives Appropriate Guidance, Including Recognition of a Compelling Interest in Protecting Human Life.*

Respondents also rely on the case of *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990). *Compassion In Dying*, 79 F.3d at 814. Respondents leap from *Cruzan*'s assumption, for purposes of the case, that there is a liberty interest (not a fundamental right, however) in refusing nutrition and hydration, *Cruzan*, 479 U.S. at 279, to a liberty interest in assisted suicide. *Id.*

While *Cruzan* involves a subject conceptually more applicable to assisted suicide than does the abortion case of *Casey*, close examination of *Cruzan* reveals that it actually leads in a different direction than Respondents attempt to take it. *Cruzan* found that there is an unqualified state interest in protecting individual human life, citing the laws against assisting suicide in support of that interest. *Cruzan*, 497 U.S. at 280. Therefore, what *Cruzan* did not do was to find any fundamental right or liberty interest in committing suicide. The Court did not even speak of a "right to die," referring instead to a "right to refuse treatment" in its discussion of the line of cases involving decisions to forego treatment. *Id.* at 270. Justice Scalia, in his concurring opinion, discussed at length why there is no constitutional right to suicide or assisted suicide. *Id.* at 294-95 (citing Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 25 Duquesne L. Rev. 1 (1985)). The *Cruzan* decision also demonstrated an analysis for finding protected liberty interests, which does not involve the springboard of analogy but involves the careful sort of analysis set forth below, the sort of analysis which must be applied to the case at bar.

Before turning to the appropriate analysis for testing new alleged rights for constitutionality, it should be briefly noted that

the interest in protecting human life is affirmed in other legal contexts, in addition to *Cruzan*. The right to refuse treatment cases uniformly affirm a state interest in preventing suicide. *See, e.g., Tune v. Walter Reed Hosp.*, 602 F. Supp. 1452, 1455 (D.D.C. 1985). In addition, the very criminal law at issue in this case is evidence of the strong state interest in protecting life and preventing suicide, for virtually every jurisdiction bars assisted suicide, as noted by this Court in *Cruzan*. 505 U.S. at 280. In light of the affirmation of *Cruzan* and these cases for a strong state interest in protecting life and preventing suicide, it is clear that no constitutional right to assisted suicide exists.

Given that neither *Casey* nor *Cruzan* establishes a right to assisted suicide, a substantive due process analysis must be conducted to determine whether a right to assisted suicide exists. The appropriate analysis is based on the objective and historically-anchored test discussed *supra*. Respondents have proposed a "right to assisted suicide" which is without basis in any Constitutional provision. Furthermore, any asserted interest in assisted suicide is overruled by several well-recognized compelling state interests in protecting innocent individual human life.

II. UNDER THE APPROPRIATE TEST, THERE IS NO FUNDAMENTAL RIGHT TO ASSISTED SUICIDE.

As described above, the proper analysis for the recognition of a constitutional right to assisted suicide is whether assisted suicide is implicit in the concept of ordered liberty and/or so rooted in the traditions and conscience of our people as to be ranked as fundamental. The test is not whether an individual has a "right to define one's own concept of existence," *Casey*, 505 U.S. at 851, or any other abstract, generalized formulation that would encompass a whole range of legal and illegal behavior. The test is also not some sort of leap by analogy from a right to abortion or to refuse medical treatment to a right to have another person assist one in suicide. The U.S. Constitution does not expressly guarantee any right to commit suicide, so any asserted right must be anchored in some other express right. The possible and proposed rights are considered below. *See also* Bopp, *Is Assisted Suicide Constitutionally Protected?*, 3 Issues in L. & Med. 113 (1987) (hereinafter "*Assisted Suicide*" (discussing and rejecting the asserted rights mentioned below as an asserted basis for a right to assisted suicide at 117-28).

A. *No Constitutional Provision Guarantees a Right to Assisted Suicide.*

Respondents have relied in part on the "right to refuse medical treatment" assumed for purposes of analysis in *Cruzan*, 497 U.S. at 279. *Compassion In Dying*, 79 F.3d 790 at 814. This reliance fails to make the constitutionally-significant distinction between ongoing medical treatment and committing physician-assisted suicide. By basing the analogy on *Cruzan* and the broad "bodily integrity" and "defining one's existence" language of *Casey*, discussed *supra*, a leap is made to asserting a due process right to assisted suicide. As discussed above, framing a proposed fundamental right in such a broad manner is a flawed analysis, and will certainly lead to a flawed result. Indeed, if the right to define one's own existence allows a terminally ill person to have assisted suicide, why would there also not be such a right for persons not terminally ill under that same right. Furthermore, unlike suicide, a refusal of medical treatment may not be motivated by an intent to die. The patient may be balancing the risks and benefits of treatment. *In re Yetter*, 62 Pa. D.&C. 619 (1973) (woman refused biopsy for fear of death in surgery). A procedure with uncertain promise of sustaining life may be refused if the patient feels the benefits do not outweigh the burdens, without the specific intent to die inherent in suicide. *See also Assisted Suicide* at 120 (discussing the common law roots of the right to refuse medical treatment in the concept of battery, which allows rejection of treatment and no more).

Another flaw in the analogy to *Cruzan*'s "right to refuse life sustaining treatment" is that virtually all of the courts have found this right to refuse life-sustaining treatment have also found a compelling interest in preventing suicide. *See, e.g., Tune v. Walter Reed Hosp.*, 602 F. Supp. 1452 (D.D.C. 1985). See also *Assisted Suicide* at 119 n.27 (providing an extended list of cases finding a

compelling interest in preventing suicide). The New Jersey Supreme Court put the matter this way in the case of *In re Conroy*, 98 N.J. 321, 486 S.2d 1209 (1985):

> [D]eclining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows a disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury.

In re Conroy, 98 N.J. at 350, 486 A.2d at 1224 (citations omitted).

The "right to autonomy" also does not support a right to assisted suicide. Plaintiffs/Respondents and the Ninth Circuit also found a due process liberty interest in "hastening one's own death." *Compassion In Dying*, 79 F.3d at 812. The right to autonomy, often confused with the right to privacy, was best set out by John Stuart Mill, who asserted that, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John S. Mill, *On Liberty* in 43 Great Books of the Western World 271 (1952). If Mill's assertion is accepted, a law may rightly forbid a physician from doing harm to another, i.e., killing another or assisting another in killing him- or herself. The state may also rightly conclude that endorsing suicide in any situation may cause harm to vulnerable populations, which would also justify a limitation of autonomy with regard to suicide and assisted suicide.

Additionally, when the right to autonomy clashes with the right to life in our constitutional system, the life interest triumphs. This is so because, as Justice Brennan states it, the right to life is the "right to have rights." *Furman v. Georgia*, 408 U.S. 238, 290 (1971) (Brennan, J., concurring). Death is the extinguishment of rights, not the triumph of one right over another. Therefore, any autonomy right to assisted suicide must yield to the right to life. *See also Assisted Suicide* at 125-28 (discussing the autonomy argument).

The right of privacy/ liberty does not encompass a right to assisted suicide. The Ninth Circuit decision relies heavily upon the abortion line of cases culminating in *Casey*, 505 U.S. 833, as support for the right to assisted suicide. *Compassion In Dying*, 79 F.3d at 813-814. Although the joint opinion in *Casey* chose to speak in terms of a fourteenth amendment liberty, the specific aspect of liberty in which the court has relied on since *Roe*, 410 U.S. 113, has been the privacy doctrine. No matter which term is used, however, the test for a fundamental right remains the same.

The analysis described above explains that the proper formulation of the proposed right in this case is whether there is a fundamental right to assisted suicide. Then that query must be submitted to the test of whether a right to assisted suicide is "deeply rooted in this Nation's history and tradition," *Bowers*, 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. at 503 (1977) (opinion of Powell, J.), or "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Id.* (quoting *Palko*, 302 U.S. at 325-26). As the *Bowers* Court stated, these tests are essential to "assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves more than the imposition of the Justices' own choice of values . . . ." *Id.* at 191.

It is clear that a right to assisted suicide is neither implicit in the concept of ordered liberty nor deeply rooted in American history and tradition, for at the time the fourteenth amendment was ratified twenty-one of the thirty-seven states criminalized assisted suicide. Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 25 Duquesne L. Rev. at 76. Those states which did not explicitly recognize assisted suicide as a crime in 1868, did so within the following fifty years. *Id.* at 77-100, 148-242. *See also Special Issue: A Symposium on Physician Assisted Suicide*, 35 Duquesne L. Rev. 1 (1996). In 1973, the U.S. Supreme Court could characterize the laws against assisted suicide as "constitutionally unchallenged," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), and in 1990 this Court found there is an unqualified state interest in protecting individual human life, citing the laws against assisting suicide in support of that interest. *Cruzan*, 497 U.S. at

280. *See also Assisted Suicide* at 120-25 (discussing and rejecting an asserted right to assisted suicide and the privacy doctrine).

B. *Compelling State Interests in Protecting Innocent Individual Human Life Overrule Any Asserted Interest in Assisted Suicide.*

Although there is no fundamental right to assisted suicide, even if there were such a right it would be trumped by the existence of compelling state interests in preserving life, protecting third parties, maintaining the ethical integrity of the medical profession (precluding physician involvement), and in preventing suicide. These issues are discussed in sequence below. An excellent resource on ways that a regime of physician assisted suicide would seriously endanger the vulnerable members of our society is The New York Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994).

1. An Interest in Preserving Life Outweighs Any Interest in Assisted Suicide.

Preserving human life is a compelling interest so strong that it even applies to protect viable unborn humans, which this Court in Roe deemed to be only "potential life." *Roe*, 410 U.S. at 163-64. Some courts evaluate this interest only in the context of an individual human, arguing that the interest of the state decreases in relation to the person's prognosis. *See, e.g., In re L.H.R.*, 253 Ga. 439; 321 S.E.2d 716, 723 (1984) ("While the state has an interest in the prolongation of life, the state has no interest in the prolongation of dying . . . ."). Some advocates of assisted suicide argue that if a person waives his or her right to life, the state's interest evaporates. Garbesi, *The Law of Assisted Suicide*, 3 Issues in L. & Med. 93, 107 (1987). It is surely questionable whether one may waive the right to have rights. Is not the right to life "inalienable?"

However, assuming for the sake of argument that the right to life is alienable, the state's interest in life cannot be confined to a single individual. It includes not only the life of the individual but the general societal interest in preserving the inherent sanctity of

human life. Any concession that one person's life has less value, whether by reason of age or disability, is to lessen the value of all life. Moreover such an approach rejects the high constitutional value of equality.

While assisted suicide rights activists urge the recognition of the right for competent adults, there is no constitutionally sound way to confine the right to adults. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), recognized that minors have a right to exercise fundamental constitutional rights. Minors would clearly have a right to assisted suicide if it were found to be a fundamental constitutional right. Moreover, recognizing a constitutional right to suicide or assisted suicide would have the effect of signalling societal approval of the act, putting many at increased risk for suicide.

There is also the problem of how to confine the right to assisted suicide to competent persons, for numerous cases since *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), have focused on preserving the constitutional rights of incompetent persons. Via the doctrine of substituted judgment, many incompetent persons would soon be treated to their constitutional right to assisted suicide. The Ninth Circuit acknowledges this likely extension of the assisted suicide right from the logic of their decision. *Compassion in Dying*, 79 F.3d at 823-24. As Judge Reinhardt wrote for the court, "a decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself." *Id.* at 832 n.120.

The state has a compelling interest in preserving both individual lives and the sanctity of human life. This compelling interest overrides any constitutional interest, liberty, or fundamental right to assisted suicide. *See also Assisted Suicide* at 129-32 (discussing at length the state interests in preserving life).

2. An Interest in Protecting Third Parties Outweighs Any Interest in Assisted Suicide.

The state also has a compelling interest in protecting third parties. For example, parents have duties of support to their children which are legaily enforceable. Debtors have legal duties to creditors. Of course, in addition to legal debts, there are moral debts members of society owe to others. If society may prohibit an individual from escaping his or her legal debts in other ways, why may a state not do so by prohibiting suicide? The courts have considered this interest too narrowly, considering only the presence or absence of minor children who will be affected. *See, e.g., St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985) (finding no abandonment of child because primary residence was with other parent and patient had purchased annuity naming child as beneficiary). However, third parties may be more profoundly affected by suicide than by other cases leading to the death of a parent. One woman wrote about her mother's suicide:

> Suicide is not a normal death. It is tragic beyond the most shattering experiences, and the ultimate form of abandonment. There is no fate on which to place the blame. It rests squarely on the shoulders of the victim and the people left behind, many of whom spend the rest of their lives wondering if there was anything they could have done to prevent such a tragedy.

Scheinin, *The Burden of Suicide*, Newsweek, Feb. 7, 1983, at 13.

Because suicide is a social act, communicating to other people, the state has a strong interest in protecting innocent parties from such infliction of distress.

3. An Interest in Preserving and Maintaining the Ethical Integrity of the Medical Profession Outweighs Any Interest in Assisted Suicide.

Society also has a compelling interest in opposing physician involvement in assisted suicide, something many assisted suicide advocates envision. Allowing assisted suicide directly places the healing profession of medicine into the business of killing. As the *Quinlan* court observed, the conduct of the medical profession

"must, in the ultimate, be responsive not only to the concepts of medicine but also to the common moral judgments of the community at large." *Quinlan*, 70 N.J. at 44, 355 A.2d at 665. That physicians, who are supposed to be healers, must not become killers, was thought to be resolved millennia ago with the Hippocratic Oath, which bars giving "deadly medicine to anyone," and begins, "First, do no harm." Hippocrates, *The Medical Works of Hippocrates* 9 (trans. J. Chadwick & W. Mann, 1950). The Hippocratic bar against physician involvement in killing of any sort is vital, as explained by anthropologist Margaret Mead:

> For the first time in our tradition, there was a complete separation between killing and curing. Throughout the primitive world the doctor and the sorcerer tended to be the same person. He with the power to kill had the power to cure, including specially the undoing of his own killing activities. He who had power to cure would necessarily also be able to kill. With the Greeks, the distinction was made clear. One profession, the followers of Asclepias, were to be dedicated completely to life under all circumstances, regardless of rank, age, or intellect the life of a slave, the life of the Emperor, the life of a foreign man, the life of a defective child. . . . This is priceless possession which we cannot afford to tarnish, but society always is attempting to make the physician into a killer to kill the defective child at birth, to leave the sleeping pills beside the bed of the cancer patient. It is the duty of society to protect the physician from such requests.

Levine, *Psychiatry and Ethics* 377 (1972) (personal communications from Margaret Mead), quoted in Hilgers & Horan, *Abortion and Social Justice* 310-11 (1972).

Another problem with allowing physicians to assist in suicide is that physicians would soon feel a legal duty to routinely advise patients of the suicide option to avoid legal liability. This would not only have the effect of increasing assisted suicides but would complete the transformation of the physician to a routine killer. *See also Assisted Suicide* at 133-35 (discussing the topic of this subsection at greater length).

4. An Interest in Preventing Suicide Outweighs Any Interest in Assisted Suicide.

Finally, the states have a highly relevant compelling interest: the prevention of suicide. Virtually all the courts considering withdrawal or refusal of treatment cases have recognized this compelling interest. *See, e.g., Tune v. Walter Reed Hosp.*, 602 F. Supp. at 1455. *See also Assisted Suicide* at 136 n.100 (listing numerous cases which have recognized this interest).

One of the grounds for this interest is the state's interest in protecting persons with mental disorders. Ninety-three to ninety-four percent of persons who have committed suicide are believed to have suffered from mental disorders. Robins, *The Final Month* 12 (1981) (94%); Baraclough, Bunch, Nelson & Sainsbury, *A Hundred Cases of Suicide: Clinical Aspects*, 125 Brit. J. Psych. 355, 358 (1974) (93%). Although many persons with mental disorders will not be capable of rational decisionmaking, *Assisted Suicide* at 137 & notes (discussing the effect of certain mental disorders), they would not necessarily be judged legally incompetent. For example, the numerous followers of the Rev. Jim Jones who committed mass suicide in Guyana in 1978 were not likely to have been declared legally incompetent. *See* Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 25 Duquesne L. Rev. at 142-45. Efforts to restrict suicide to voluntary, competent adults would certainly sweep in many persons who were possessed of irresistible psychological predispositions to suicide.

Moreover, many persons who attempt suicide do not simply wish to die. The suicide attempt may often be an appeal for help, a blackmail attempt, an effort at escape, an expression of aggression, or a form of self-punishment. Ruebenstein, Moses & Lidz, *On Attempted Suicide*, 79 Arch. Neurol. & Psych. 103 (1958). Such attempts need to be greeted with intervention, not an offer of assistance in suicide. If not, a large population which could have been helped would die. The state has a clear, compelling interest in protecting this vulnerable population.

Society also has a compelling interest in resisting manipulated suicides. Were suicide to become common, persons considered

"burdens" on relatives would feel considerable pressure to be assisted in ceasing to become burdens. This risk, and the risk of substituted judgment assistance in suicide would extend to persons in nursing homes, mental institutions, and group homes for persons with mental and emotional difficulties.

Finally, as John Stuart Mill observed, society has an interest in the contribution of each member of a society, for "everyone who receives the protection of society owes a return for the benefit," which includes "not injuring the interests of another" and "bearing his share . . . of the labours and sacrifices incurred for defending the society or its members. . . . [W]hen a person disables himself, by concept of purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense." John S. Mill, *On Liberty* in 43 Great Books of the Western World at 302-03, 306. Suicide disables a person forever of rendering any contribution to society. *See also Assisted Suicide* at 135-40 (discussing this subject in greater depth).

CONCLUSION

In sum, there is no fundamental right to assisted suicide, and, even if there were, there are ample compelling interests which would justify the State of Washington in proscribing assisted suicide. Vulnerable members of society deserve more from a culture which desires to consider itself civilized and humane than assistance or encouragement in the annihilation of all of their rights by self-destruction.

For the above reasons, your *amici* respectfully pray this Court (1) to hold that there is no right to assisted suicide in the Constitution of the United States, and (2) to reverse and/or vacate the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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